

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORIAN G. JONES,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 254409
Wayne Circuit Court
LC No. 99-003599

Before: Gage, P.J., and Hoekstra, and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of ten to fifteen years in prison for manslaughter, MCL 750.321. We affirm.

The victim in this case was shot five times, twice in the chest at close range and three times in the back of the head. Defendant was tried in 2000 on charges of possession of a firearm during the commission of a felony, MCL 750.227b, and first-degree murder, MCL 750.316. The jury found defendant guilty of felony-firearm and second-degree murder, MCL 750.317. The trial court imposed a life sentence for the murder conviction, and this Court affirmed. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 227350). However, the Michigan Supreme Court concluded that defendant's jury should have received an instruction on voluntary manslaughter, and it reduced the murder conviction to manslaughter and ordered resentencing. *People v Jones*, 469 Mich 904; 668 NW2d 904 (2003).¹

Because the offense at issue was committed before the January 1, 1999, effective date of the statutory guidelines, MCL 769.34(1) and (2), the judicial sentencing guidelines apply. The recommended range for the minimum sentence under those guidelines was one to five years. The ten-year minimum sentence defendant actually received thus constitutes a substantial departure.

In announcing its intent to impose what was the maximum allowable sentence, the trial court stated as follows from the bench:

¹ The Court alternatively allowed the prosecutor to retry defendant for second-degree murder, but the prosecutor elected not to do so.

I heard this case, and I do remember it. And I do remember that the defendant was on the phone with the victim at a different location. Hung up the phone and said, "I'm going to go over there and kick his ass."

He then left where he was, went over to where the victim was, pulled a gun, shot him in the head. And then while the man was laying on the ground he shot him again.

Now, according to the rules at that time, when there was a request made for manslaughter, the law at that time was that manslaughter was not an included offense, and I was not required to give it, absent any evidence to show that there was provocation. Well, I did that.

The Court of Appeals said, "You were correct." The Supreme Court changed the rules and said I should have given manslaughter, and sent it back.

But there is no way in the world that anyone can be provoked to shoot someone in the head, and then shoot them while they're on the ground. The cue-de-gras [sic]. And then get manslaughter.

This is not my doing; this is an Order from the Supreme Court. The facts are just as horrendous today as they were when this trial was held.

I think that guidelines in this case are ridiculous. They don't reflect the gravity of the offense. And that is not the will of the People of the State of Michigan when they formulated guidelines in the first place.

And to tell me that you can kill somebody, shoot them in the head, and we get a guidelines, "well, it's five years." That's no big deal. I know life isn't worth much in this community anyway, but this has cheapened it even further.

I'm not going to be any part of this. I'm going to sentence him to the maximum that I can give, and that will be 10 to 15, plus two for the Felony Firearm.

And it really is a shame that this case is even back here in the first place. The man was convicted by a jury, based on the evidence at that time. And those facts have not been reversed.

In its departure evaluation, the court reiterated, "The shooting was deliberate and premeditated."

A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The judicial guidelines are not a legislative mandate, and courts are not strictly required to follow them. *Id.* at 656-657. However, a court upwardly departing from the judicial guidelines must place its reasons for doing so on the record at the time of sentencing. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987).

A court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines. See *People v Granderson*, 212 Mich App 673, 680-681; 538 NW2d 471 (1995). Additionally, a court may consider, as an aggravating factor, that a defendant's actions reflected a more serious crime where that determination was supported by a preponderance of the evidence. *People v Coulter*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994); *People v Ratkov*, 201 Mich App 123, 126-127; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994). "[W]here . . . there is record support that a greater offense has been committed by a defendant, it may constitute an aggravating factor to be considered by the judge at sentencing" *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989).

Appellate counsel relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), in which the United States Supreme Court held that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." 124 S Ct at 2543 (emphasis in original). However, the Michigan Supreme Court has held that *Blakely*, *supra*, is inapplicable to Michigan's sentencing scheme. *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

In challenging the upward departure on general grounds, appellate counsel emphasizes that the trial court expressed disdain for the guidelines in this instance. However, the trial court did acknowledge that the high end of the guidelines' recommendation was a five-year minimum sentence, and appellate counsel does not challenge any part of the trial court's recitation of facts in support of its decision to depart. In light of those unchallenged factual findings, we agree with the trial court that defendant, who expressed a determination to harm the victim and then shot the victim five times, including three times in the head, thereby earned his minimum sentence that is five years longer than five-year upward limit of the range under the judicial guidelines.

Defendant, arguing in propria persona, asserts that the trial court's reasons for departing were not objective and verifiable. However, the general objective-and-verifiable requirement is a function of the legislative guidelines, not the judicial ones. See MCL 769.34(3); *People v Babcock*, 469 Mich 247, 257-258, 272; 666 NW2d 231 (2003). Indeed, defendant's pervasive reliance on provisions from the legislative guidelines, and related caselaw, is inappropriate for that reason.

Defendant also argues in passing that the reasons cited by the trial court were already accounted for in the guidelines, but defendant does not specify those reasons, let alone set forth precisely how they were factored into the guidelines calculation. This failure of presentation precludes appellate consideration. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Defendant generally argues that this is not the sort of "exceptional case" that warrants a departure. But, again, a manslaughter involving deliberation beforehand, and the firing of five

shots into the victim's body, including three in the head, is indeed an exceptional one, well justifying the ten-year minimum sentence imposed.

Affirmed.

/s/ Hilda R. Gage

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray